Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

OWIN DANZELL,

Petitioner,

vs.

JOHN ASHCROFT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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4 APP

QUESTION PRESENTED FOR REVIEW

Whether different interpretations of the Immigration and Nationality Act by the United States Courts of Appeals violate the United States Constitution's uniform rule of naturalization?

PARTIES TO THE PROCEEDING

These parties have an interest in the outcome of this proceeding.

1. Owin Finbar Danzell
   Petitioner, a natural person, on behalf of himself and a class of all persons coincidentally situated

2. Honorable John Ashcroft
   The Attorney General of the United States

3. Secretary Tom Ridge
   The Secretary of the Department of Homeland Security of the United States

4. Eduardo Aguirre
   Director of the Bureau of Citizenship and Immigration Services of the Department of Homeland Security

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, this document is filed by a natural person challenging the decisions of a United States governmental agency. No non governmental corporations are associated with the filing of this brief.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of certiorari issue to review the judgment below, dismissing his petition for Writ of habeas corpus.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The opinions of the United States Court of Appeals for the Fifth Circuit appear at Appendix 1-2, 7, and 25-26 (hereinafter, App. ___) and are unpublished (Opinion 2/13/03, 5 Cir., ___, ___, F.3d ___.

The opinion of the United States District Court appears at App. 5-6 and is unpublished. *Danzell v. Ashcroft*, No. H-01-CV3612 (S.D.Tx. May 22, 2002).

The opinion of the Board of Immigration Appeals appears at App. 9-13 and is unpublished. ___ I & N ___ (BIA 8/17/2001).

The opinion of the Immigration Judge appears at App. 16-23 and is unpublished. In re: Owin Finbar Danzell, A 42 081 350 – Houston.

BASIS FOR SUPREME COURT JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on February 13, 2003. App. 1. Petitioner seeks review of that judgment on a Writ of certiorari.

On March 28, 2003, the Petitioner timely filed a petition for rehearing en banc in the United States Court of Appeals for the Fifth Circuit. On April 22, 2003, the Fifth Circuit filed an order denying the petition for rehearing en banc treating the petition for rehearing en banc as a petition for panel rehearing. App. 25. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court, as it is filed within ninety days of the petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The primary constitutional provisions involved in this proceeding are **U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. Amend. XIV, § 1.**

U.S. CONST. art. I, § 8, cl. 4:

> To establish a uniform rule of naturalization.

U.S. CONST. art. I, § 9, cl. 2:

> The Privilege of the Writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State where they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The primary statutory provisions involved in this proceeding are **8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B) and 8 U.S.C. § 1229b(a), INA § 240A(a).**

8 U.S.C. § 1101(a)(43)(B); INA § 101(a)(43)(B)

The term "aggravated felony" means –

illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

8 U.S.C. § 1229b(a); INA § 240A(a)

Sec. 1229b. – Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien – (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

STATEMENT OF THE CASE

A. STATEMENT OF THE COURSE OF PROCEEDINGS

On August 17, 2001, the Board of Immigration Appeals affirmed the decision of the Immigration Judge

classifying Danzell as an "aggravated felon," and denying him the opportunity to apply for "cancellation of removal." App. 8. If Danzell had not been declared an "aggravated felon" he would have been eligible to apply for relief from removal by seeking "cancellation of removal" pursuant to INA § 240A(a), 8 U.S.C. § 1229b(a).

On October 15, 2001, the United States Court of Appeals for the Fifth Circuit denied Danzell's petition for review for lack of jurisdiction and did not reach the "merits" of Danzell's claims. App. 7. On October 19, 2001, Danzell filed a petition for a Writ of habeas corpus in the District Court. The petition for Writ of habeas corpus was ordered dismissed by the District Court on July 26, 2002 for "want of jurisdiction." App. 3. An appeal of the denial of the Writ of habeas corpus followed and was denied on February 13, 2003 by the United States Court of Appeals for the Fifth Circuit. App. 1. On March 28, 2003, the Petitioner timely filed a petition for rehearing en banc in the Court of Appeals for the Fifth Circuit. On April 22, 2003, the Court of Appeals filed an order denying the petition for rehearing en banc treating the petition for rehearing en banc as a petition for panel rehearing. App. 25.

CONCISE STATEMENT OF THE FACTS

The facts in this matter are not in controversy.

On August 18, 1989, Petitioner, Owin Finbar Danzell, was lawfully admitted as a permanent resident alien of the United States. Following his admission, Danzell twice pled guilty to felony possession of a controlled dangerous substance in the Criminal District Courts in the State of

Texas. On February 15, 2001, Danzell was ordered removed from the United States in violation of INA § 237(a)(2)(A)(3), 8 U.S.C. § 1227(a)(2)(A)(iii) (convicted of an "aggravated felony") and in violation of § 237(a)(2)(B)(1), 8 U.S.C. § 1227(a)(2)(B)(1) (convicted of a controlled substance violation after admission into the United States). After the Immigration Court classified Danzell an "aggravated felon", Danzell was denied the opportunity to apply for relief from removal known as "cancellation of removal" pursuant to INA § 240A(a), 8 U.S.C. § 1229b(a).

Danzell challenges his inclusion into a class of aliens known as "aggravated felons."

SUMMARY OF ARGUMENT

The contrasting interpretations of the phrase "aggravated felony" by the United States Circuit Courts of Appeals violates the United States Constitution's uniform rule of naturalization and creates disparate results for similarly situated aliens. A non uniform definition of the phrase "aggravated felony" also violates the equal protection and due process clauses of the United States Constitution.

For example, aliens who have similarly been convicted of controlled substance violations may or may not be classified as "aggravated felons" depending on the controlling jurisdiction's interpretation of the phrase. Consequently, aliens who are classified as "aggravated felons" in one venue are denied an opportunity to apply for relief from removal and are subject to removal from the United States, while aliens in a different venue are eligible to

apply for relief from removal and are arguably eligible for naturalization. Until it can be determined what an "aggravated felon" is in the first instance, Danzell should not be classified as such.

ARGUMENT

The Immigration and Nationality Act fails to provide a concise uniform definition of what constitutes an "aggravated felony." Instead, Congress provides a listing of different offenses, which fall within the phrase "aggravated felony." INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). The specific statute in question is INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The statute provides that the term "aggravated felony" means:

> Illicit trafficking in a controlled substance (as defined in Section 102) of the Controlled Substances Act, including a drug trafficking crime (as defined in Section 924(c) of title 18, United States Code).

The United States Circuit Courts of Appeals that have had an opportunity to interpret this statute have developed different standards of review and have reached different results. The primary issue surrounding the controversy is whether state drug convictions classified as felonies under applicable state law, but not classifiable as felonies under federal law, constitute "drug trafficking crimes" under 18 U.S.C. § 924(c), such that they may be considered an "aggravated felony" under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

A review of the relevant case law in the various United States Courts of Appeals and the Board of Immigration Appeals all agree that a state drug offense

constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c), if it is (1) punishable under one of the three enumerated federal drug statutes (Controlled Substances Act, 21 U.S.C. § 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. § 951 et seq., or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.), and (2) is a felony. The primary conflict amongst the United States Circuit Courts is over whether a state felony that is analogous to a federal misdemeanor is definable as an "aggravated felony" within the ambit of the Immigration and Nationality Act.

The Courts of Appeals for the Second and the Third Circuits have both held that a state court drug felony conviction that is analogous to a federal misdemeanor is not an "aggravated felony", *USA v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999) and *Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002). In contrast, another United States Court of Appeals, namely the Fifth Circuit, has held that for purposes of whether a state drug conviction meets the definition of "aggravated felony", the conviction can be a felony under state or federal law, *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 2001) and *U.S. v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001).

In *Pornes-Garcia*, the Second Circuit also held that the term "aggravated felony" is applied differently depending on the context of usage. For example, in the deportation context, one is not an aggravated felon if the drug offense is a state felony but not analogous to a federal felony. However, in the Second Circuit and in the criminal sentencing guidelines context, one is an "aggravated felon" if the state drug offense is classifiable as a state or federal felony. The Fifth Circuit does not make a distinction between the context in which the term "aggravated felony"

is used. The Fifth Circuit has simply held that in the deportation context or in the federal sentencing guidelines context, a state drug offense is an "aggravated felony" if it is a felony under either state or federal law. *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 2001).

Additionally, in *Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002), the Third Circuit also disregarded the hypothetical felony rule in reaching the meaning of an "aggravated felony." Under the federal definition, a second drug offense may be a felony if the individual has a prior state or federal drug conviction and is charged as a multiple offender. While Gerbier had two state court drug convictions, the Third Circuit held that neither conviction met the definition of a federal felony and combined they could not be used to equate to a hypothetical federal felony and meet the definition of an "aggravated felony." In the Fifth Circuit, the hypothetical felony rule is also disregarded as one simply needs a drug conviction that would be a felony under state or federal law to be an "aggravated felony." *U.S. v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001). In stark contrast, Gerbier is not an aggravated felon for having two state drug convictions but in the Fifth Circuit, an individual with one state drug conviction that is a felony under either the state or federal definition, is an "aggravated felony."

The United States Constitution art. I, § 8, cl. 4, provides for uniform United States naturalization laws. While the United States Constitution does not specifically mention that all immigration and nationality laws should be uniform, Danzell contends that all immigration laws should be uniform, as a matter of national sovereignty rather than state policy. The meaning of "aggravated

felony" is included within the parameters of the Immigration and Nationality laws of the United States and its application should be uniform across the United States.

The principle of uniformity, as a matter of national sovereignty rather than state policy has been addressed by this Court in several cases: *Henderson v. Mayor of New York*, 92 U.S. 259 (1875); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) and *Hines v. Davidowitz*, 61 S. Ct. 399 (1941). In each of these cases, individual states passed legislation to regulate aliens within their borders. In each case, the Supreme Court struck down the state law in favor of a uniform federal law.

Presently, the definition of the term "aggravated felony" differs by state depending on the venue of the controlling Circuit Court in which the issue arises. Without a federal uniform definition of the phrase "aggravated felony" not only are some aliens deportable while others or not deportable but it is also possible for some aliens to avoid the "aggravated felony" classification and meet the good moral character requirement for United States Citizenship through naturalization[1], while some others are deported. This promotes forum shopping.

[1] One who has been convicted at any time of an aggravated felony lacks good moral character. INA § 101(f), 8 U.S.C. § 1101(f).

CONCLUSION

The meaning of an "aggravated felony" is vague and ambiguous. This confusion is a direct result of a split in the Circuit Courts of Appeals. Any discrepancies should be read in favor of the alien. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

For these reasons, the Court should grant the petition for Writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner

[2] Admission to the bar of the Supreme Court is pending.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20748
Summary Calendar

OWIN DANZELL,

Petitioner-Appellant,

versus

JOHN ASHCROFT, U.S. ATTORNEY GENERAL; HIPOLITO M. ACOSTA, Acting District Director of the Houston District Office of The Immigration and Naturalization Service,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CV-3612

(Filed Feb. 13, 2003)

Before BARKSDALE, DEMOSS, and BENAVIDES, CIRCUIT JUDGES.

PER CURIAM:*

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Owin Danzell, a native of Trinidad admitted to the United States in 1989 as a permanent resident alien, appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Danzell's petition challenged an order of deportation in which it was determined that he was removable as an aggravated felon pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) on account of his state cocaine-possession convictions. The district court determined that it lacked jurisdiction to entertain the 28 U.S.C. § 2241 petition because the arguments raised therein had been rejected by this court in dismissing Danzell's direct petition for review of the deportation order. Alternatively, the district court determined that Danzell's arguments were foreclosed by this court's precedent.

It is unclear from the record whether Danzell's direct petition for review to this court raised the same issues asserted in the instant petition for a writ of habeas corpus. In any event, the arguments Danzell raised in his 28 U.S.C. § 2241 petition concerning whether his state controlled-substance convictions are "aggravated felonies" are foreclosed by this court's precedent. *See United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), *cert. denied* 122 S. Ct. 305 (2001); *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OWIN DANZELL,	§	
Petitioner,	§	
	§	
vs.	§	CIVIL ACTION NO. H-01-3612
JOHN ASHCROFT, *et al.*,	§	
	§	
Respondent.	§	

ORDER

On May 22, 2002, this court dismissed Danzell's petition for habeas relief under 28 U.S.C. § 2241 for lack of jurisdiction. This court found that it lacked jurisdiction to review a removal order challenged on a basis that was considered on direct review by the court of appeals. This court also found that even if this court had jurisdiction, Danzell's petition would not merit the relief he sought.

Danzell's request for stay of removal pending appeal, (Docket Entry No. 13), is DENIED.

SIGNED on July 26, 2002, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OWIN DANZELL,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-01-CV3612
JOHN ASHCROFT,	§	
Attorney General of	§	
The United States, *et al.*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the court's Memorandum and Opinion of even date, this action is DISMISSED with PREJUDICE.

This is a Final Judgment.

SIGNED on May 22, 2002, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OWIN DANZELL,	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
JOHN ASHCROFT,	§	NO. H-01-CV3612
Attorney General of	§	
The United States, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND OPINION

Owin Danzell, a citizen of Trinidad and Tobago and a convicted felon, filed a habeas corpus petition under 28 U.S.C. § 2241, asking this court to set aside the order of the Bureau of Immigration Appeals, removing him from this country based on his status as an aggravated felon convicted of drug offenses. Danzell argues that he is not properly classified as an aggravated felon. The Fifth Circuit denied his petition for review for lack of jurisdiction. In this court, Danzell claims that his convictions for felony possession of cocaine are not "aggravated felonies."

The government has moved for summary judgment. Based on the petition, the motion, the record, and the applicable law, this court concludes that Danzell's petition cannot provide the basis for the relief he seeks.

The Fifth Circuit dismissed the petition for review Danzell filed. The lack of jurisdiction in that court arose from 8 U.S.C. § 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of

removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii)." Because Danzell was convicted of a listed offense, 8 U.S.C. § 1252(a)(2)(C) deprived the Fifth Circuit of jurisdiction to inquire further into the merits, and the removal order stood. *See, e.g., Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir.2000), *cert. denied*, 121 S. Ct. 757 (2001); *Valansi v. Ashcroft*, 278 F.3d 203, 207 (3rd Cir. 2000). This court lacks jurisdiction to review a removal order challenged on a basis that could be, and was, considered on direct review to the court of appeals. *See Santos v. Reno*, 228 F.3d 591 (5th Cir. 2000).

Even if this court did have jurisdiction, Danzell's petition would not provide the relief he seeks. This circuit has clearly held that felony possession of cocaine convictions are aggravated felonies. *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001); *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

This petition is dismissed. Final judgment will be entered by separate order.

SIGNED on May 22, 2002, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-60726

OWIN FINBAR DANZELL

Petitioner

v.

JOHN ASHCROFT, U S Attorney General

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Oct. 15, 2001)

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Petitioner for stay of deportation pending review is DENIED.

IT IS FURTHER ORDERED that the motion of Respondent to dismiss petition for review for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the alternative motion for an extension of 30 days after disposition of the motion to dismiss petition in which to file the administrative record is DENIED AS UNNECESSARY.

[SEAL]

U.S. Department of Justice

Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name:
DANZELL, OWIN FINBAR

AC2-081-350
Date of this notice:
08/17/2001

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ Lori Scialabba

Lori Scialabba
Acting Chairman

Enclosure

Panel Members:
GRANT, EDWARD R.
SCHMIDT, PAUL W.
THOMAS, ELLEN K.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the U.S.
Immigration Appeals

File: A42 081 350 – Houston

Date: AUG 17 2001

In re: OWIN FINBAR DANZELL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Martha E. Garza, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Remand

We have jurisdiction over this timely appeal pursuant to 8 C.F.R. § 3.1(b). Removability is conceded in part and contested in part.[1] The respondent, a citizen of Trinidad, argued on appeal that the Immigration Judge incorrectly determined that he was removable from the United States as an aggravated felon pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(2)(A)(iii). He also requests consideration for

[1] The respondent has not challenged on appeal his removability under section 237(a)(2)(B)(i) of the Act. 8 U.S.C. § 1227(a)(2)(B)(i).

cancellation of removal under section 240A of the Act. 8 U.S.C. § 1229b.The appeal is dismissed.

Regarding the respondent's claim that his convictions fro the offenses of possession of cocaine are not convictions for an aggravated felony, the record establishes that the respondent was convicted on January 18, 2000, and August 31, 1999, for such offenses. For each of these offenses, he was sentenced to a year imprisonment to run concurrently.[2] The respondent's convictions are final unless overturned. *See Okabe v. INS*, 671 F.2d 863 (5th Cir. 1982); *Matter of Polanco*, 20 I&N Dec. 894 (BIA 1994).

The Board has held that a federal definition applies to determine whether a crime is a "felony" within the meaning of 18 U.S.C. § 924(c)(2), and therefore is an "aggravated felony" under section 101(a)(43) of the Act. *See Matter of L-G-*, I&N Dec. 89 (BIA 1995). For immigration purposes, a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is punishable as a felony under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*). *Id. See also Matter of K-V-D-*, Interim Decision 3422 (BIA 1999); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barret*, 20 I&N Dec. 171 (BIA 1990). A felony under federal criminal law is any offense where the maximum term of imprisonment exceeds 1 year. *See* 18 U.S.C. § 3559(a); *Matter of Davis, supra.*

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[2] The record reflects that the respondent violated his probation for his first conviction, and was resentenced to a term of imprisonment.

Under Board precedent, the respondent's first possession of cocaine offense is not an aggravated felony because it is not punishable as a felony under federal law. *See* 21 U.S.C. § 844(a); *Matter of K-V-D-*, *supra*; *Matter of L-G-*, *supra*. However, the respondent's subsequent conviction in 2000 for possession of cocaine is punishable as a felony under the Controlled Substances Act because of the prior conviction. *See* 21 U.S.C. § 844(a) and 18 U.S.C. § 3559(a). We further note that cocaine, is a controlled substances under federal law. 21 U.S.C. § 812. Therefore, under Board precedent, the respondent has been convicted of an aggravated felony as defined under section 101(a)(43)(B) of the Act, and he is properly removable under section 237(a)(2)(A)(iii) of the Act. *See Matter of L-G-*, *supra*; *Matter of Davis*, *supra*.

In reaching our decision, we have considered the respondent's argument that his second possession of cocaine conviction is not punishable as a felony under federal law unless it is established that the United States Attorney notified him in writing that he would seek additional penalties based upon a prior narcotics conviction. The Board finds this argument unpersuasive. The respondent in the instant case was not charged by the United States Attorney, but rather was prosecuted under state law. In addition, under the immigration law, it need only be established that the respondent's possession of cocaine offense was potentially punishable as a felony under federal law, and not whether he was actually punished as such. *Cf. Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

We further note the decision of the Fifth Circuit Court of Appeals in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001). In that case, the court considered

whether an alien's conviction under state law for simple possession of heroin constituted an aggravated felony pursuant to section 101(a)(43)(B) of the Act. We note that the alien's offense therein was a felony under state law, but punishable as a misdemeanor under federal law.

The Fifth Circuit indicated that an aggravated felony includes a drug trafficking crime as defined in section 924(c) of Title 18. *See also* 8 U.S.C. § 1101(a)(43)(B). According to the court, under section 924(c), the term "drug trafficking crime" includes "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). The court further stated that a state drug conviction is a "drug trafficking crime" (and thus an aggravated felony) If "(1) the offense was punishable under the Controlled Substances Act and (2) it was a felony" under either state or federal law. *See also United States v. Hinojosa-Lopez*, 130 F.3d 891, 894 (5th Cir. 1997).

In applying *United States v. Hernandez-Avalos*, *supra*, to the facts of this case, we conclude that the respondent's drug convictions are both a "drug trafficking crime" and, therefore, an "aggravated felony" within the meaning of the applicable statutes because possession of cocaine is clearly punishable under the Controlled Substances Act, and is a felony under Texas law. Consequently, we find that the respondent is removable from the United States as an aggravated felon under both Board and Fifth Circuit precedent.

In light of our above findings, it follows that the respondent is ineligible for cancellation of removal. This form of relief is not available in the case of an alien convicted of an aggravated felony. *See* sections 240A(a)(3) and

101(a)(43)(B) of the Act. The Immigration Judge's decision is also affirmed for the reasons provided therein.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/ Edward R. Grant
FOR THE BOARD

IMMIGRATION COURT
2320 LA BRANCH ST., RM 2235
HOUSTON, TX 77004

In the Matter of

Case No.: A42-081-350

DANZELL, OWIN FINBAR
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Feb. 15, 2001. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Trinidad or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount

of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[X] Respondent's application for cancellation of removal under section 240A(a) was ~~( ) granted ( ) denied ( ) withdrawn~~ pretermitted.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ___ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section ___ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[X] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Feb 15, 2001

Appeal: Waived/Reserved by Respondent Appeal Due By: 3/19/2001

/s/ Howard Van Winkle
HOWARD VAN WINKLE
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File No.: A 42 081 350 February 15, 2001

In the Matter of

OWIN FINBAR DANZELL,) IN REMOVAL
) PROCEEDINGS
Respondent.)

CHARGE: Section 237(a)(2)(A)(3) (convicted of aggravated felony-controlled substance trafficking crime), Section 237(a)(2)(B)(1) (convicted of a controlled substance violation after admission).

APPLICATIONS: Section 240A(a) – cancellation of removal.

ON BEHALF OF RESPONDENT:

Martha Garza, Esquire
4545 Bisinet, Suite 283
Bel Air, Texas 77401

Carla Burkhart, Esquire
(Same address)

ON BEHALF OF SERVICE:

Pauline Appelbaum
Assistant District Counsel
Houston, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The record relates to a male alien, native and citizen of Trinidad, who was placed into removal proceedings pursuant to the issuance of a Notice to Appear dated January 10th of 2001. See Exhibit 1.

The Service charges the respondent with being subject to removal on two separate grounds. The first ground is that he is an alien who, after his admission, has been convicted of an aggravated felony as that term is defined

in Section 101(a)(43)(B) of the Immigration and Nationality Act (hereinafter "the Act"). The second ground of removal is that the respondent, at any time after his admission, has been convicted of a violation of a law of a state relating to a controlled substance. See *Id.*

The respondent, through counsel, did admit the factual allegations contained in the Notice to Appear and conceded removability on the second ground in the Notice to Appear. The respondent has contested removability on the aggravated felony charge of removal.

The Government did offer into the record Group Exhibit 2. Specifically, Group Exhibit 2, as well as the admissions of the respondent, would appear to establish that the respondent has been convicted on two separate occasions of simple possession of cocaine.

The group exhibit offered by the Government indicates that the respondent's first conviction for possession of cocaine occurred on August 31st of 1999. Specifically, Group Exhibit 2, Tab D, indicates that the respondent was placed on community supervision and given a deferred adjudication of guilt pursuant to such order on August 31st, '99. It indicates that the respondent was charged pursuant to an indictment with possession of cocaine weighing less than one gram, entered a plea of guilty and was given four years of deferred adjudication of guilt pursuant to that plea of guilty.

The exhibit further indicates that the respondent, subsequently, had his guilt adjudicated pursuant to a motion submitted in that the respondent was further convicted pursuant to a judgment on January 18th, 2000 for possession of cocaine weighing less than one gram and sentenced to one year state jail based on that conviction.

The respondent again found himself charged with possession of cocaine weighing less than one gram. That offense occurred on January the 14th of 2000 and significantly after or a period of time after the respondent's prior deferred adjudication on the initial possession of cocaine charge.

The record of conviction in the second possession of cocaine charge indicates that the respondent committed the offense on January the 14th of 2000 and was, in fact, convicted on January the 18th of 2000 pursuant to a plea of guilty before the Harris County District Court and was convicted of possession of cocaine weighing less than one gram.

The respondent's contention that he has not been convicted of an aggravated felony appears to possibly be twofold. Initially, in order for any state drug crime to be considered an aggravated felony, it must either be a trafficking crime, as that term is found at Section 101(a)(43)(B) specifically involving the illicit trafficking of any controlled substance and/or meet further statutorily imposed definitions, specifically involving those including drug trafficking crimes defined in Section 924(c) of Title 18, United States Code.

In this case, of course, both convictions involved the simple possession of cocaine weighing less than one gram. Neither party has intimated nor stated that either one of these charges in and of themselves should be considered an illicit trafficking in a controlled substance.

The analysis, therefore, goes within what is to be considered a drug trafficking crime as defined in Section 924(c) of Title 18, United States Cod. Well-documented for immigration purposes, is the Board's understanding that

Section 924(c)(2) does, in fact, define what can be considered an aggravated felony drug trafficking crime.

In this case, the focus appears to be whether either one of the respondent's conviction, specifically the second conviction, is to be considered a drug trafficking crime under 924(c)(2) of Title 18.

The Court finds that the respondent's second conviction for simple possession of cocaine is to be considered an aggravated felony under appropriate federal standards.

In *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), the Board of Immigration Appeals, pursuant to a reconsideration of their prior decision in that same case, indicated that where a respondent is convicted of a single drug offense of simple possession that there has been no aggravated felony violation. Specifically, in *Matter of L-G-*, the quantity of cocaine involved in that case was a very significant amount of cocaine. However, and as indicated, there was a single conviction and no other evidence of any other conviction.

The Board, in its statements throughout *Matter of L-G-*, indicates that a state violation, if it can be considered punishable as a felony under the federal drug laws, is to be considered an aggravated felony. To that end, it would appear to this Court that it is not a matter of whether the respondent has been punished for a federal felony, but whether he could have been punishable as a felony would his state cases have been handled in federal court.

The Court is mindful of the respondent's brief concerning the enhancement provisions required for a federal felony conviction under 21 U.S. Code, Section 844(a). In fact, the Court found a Third Circuit case, specifically,

Steel v. INS, ___ F.3d ___ 2001, Westlaw 5031 (3d Cir. 2001) that would fairly well pattern and support the respondent's contentions.

However, this Court believes that the Board of Immigration Appeals' statements made within *Matter of L-G-* clearly indicate that the Board of Immigration Appeals believes that a respondent convicted of two simple possession violations may well find himself punishable under the felony provisions of the United States Code at 21 U.S.C. Section 844(a).

In fact, the Board, in the *Matter of L-G-*, did use *Matter of Davis* and *Matter of Barrett's* analogous approach to whether the violation would, by analogy, be considered punishable under the federal standards. In fact, the Board stated that concerning a single offense of simple possession that that offense would be punishable only as a term of imprisonment of not more than one year *provided the defendant has no prior drug convictions*. See *Matter of L-G-*, 21 I&N Dec. at 95.

The Board found that a single offense of possession of cocaine, in *Matter of L-G-*, was not punishable as a felony. The Courts appear to not, and, specifically, the Board of Immigration Appeals, does not appear to have ever specifically faced what the respondent is raising in this area. In other words, whether a requirement that 21 U.S.C. Section 851's notice provisions must be met before a violation of law can be considered a felony punishable under the federal statutes.

There is a Third Circuit case, as stated, that would feel that these requirements must be met. However, it would appear that this Court is not favorable to the Board's analysis in *Matters of Davis* and *Barrett*. It would

appear that this Court is and does not agree with that analysis. This Court, specifically, this Immigration Court, however, is bound with the analogous type analysis to be made and finds that it is not a matter of whether the respondent, in fact, was punished under a federal violation of law in a federal court and meeting all of the federal requirements for a conviction, but whether he could have been punished in a federal court as a federal felony.

To that end, also, the *Steel* court did indicate that the enhancement provisions for 21 U.S.C. Section 851 is not considered an element of the offense. To that end, the respondent in this case has been convicted of two separate violations of simple possession of cocaine. If his case was handled in a federal court, if, in fact, felony punishment were sought, it would have been required that he be provided the notice under 21 U.S. Code, Section 851.

The fact remains that there has been no contention at any time that he has not been convicted of two separate offenses. In fact, a person under federal law if prosecuted as a felony is only required to be given notice. If no comment is made concerning the validity of the convictions then the enhanced punishment can be given by the federal court regardless of the prior conviction. The respondent is only allowed the ability to contest prior convictions due to Constitutional infirmity and/or other matters that go to the heart of the prior criminal proceedings.

This Court has no jurisdiction to go behind the records of conviction that have been presented and must be limited to these documents as presented. The Immigration Courts are not given the ability to make Constitutionality findings regarding prior convictions.

In order to accept the respondent's contentions concerning notice under 21 U.S.C. Section 851, that would, in effect, eliminate or eviscerate the applicability of the 924(c)(2)'s provision of law for any conviction outside of a federal court unless a state court had a prior enhancement provision.

If that were the case, then it would also appear that if the enhancement provisions of a particular state didn't meet the federal provisions, procedurally, under 21 U.S.C., Section 851, that that would preclude those proceedings or convictions for being considered for federal immigration purposes.

This Court feels that the requirements of 21 U.S.C., Section 851, not being elements of an offense, do not and are not required before a prior state conviction can be considered an aggravated felony under 21 U.S. Code, Section 844(a).

This Court feels that the Board of Immigration Appeals in *L-G-*, *Matter of Barrett* and *Davis*, as far as the analogy requirements, have not indicated that such a requirement is present.

Therefore, I do find that a second conviction in the respondent's second conviction on January the 18th of 2000 was after a prior conviction under state court law and, accordingly, should be considered and is considered an aggravated felony controlled substance trafficking crime under 18 U.S.C., Section 924(c)(2), and 101(a)(43)(B) of the Immigration and Nationality Act.

This finding effectively precludes the respondent from being considered for the relief of cancellation of removal for a permanent resident. That application has not been submitted nor allowed by the Court and it is hereby pretermitted. There is no claim that the respondent can make to citizenship in this country. And, accordingly, the following order will be entered.

ORDER

IT IS ORDERED that the respondent be removed from the United States to Trinidad on both of the charges in the Notice to Appear.

/s/ Howard Van Winkle
HOWARD VAN WINKLE
Immigration Judge
Houston, Texas

CERTIFICATE PAGE

I hereby certify that the attached proceeding before HOWARD VAN WINKLE, in the matter of:

OWIN FINBAR DANZELL

A 42 081 350

Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Kim Williams
Kim Williams, (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

April 16, 2001
(Completion Date)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20748

OWIN DANZELL

Petitioner-Appellant

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL; HIPOLITO M ACOSTA, Acting District Director of the Houston District Office of The Immigration and Naturalization Service

Respondents-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 2/13/03, 5 Cir., ___, ___ F.3d ___)

(Filed Apr. 22, 2003)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that

the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
OCT 2 2 2003
OFFICE OF THE CLERK

(2)

No. 03-115

In the Supreme Court of the United States

OWIN FINBAR DANZELL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether petitioner's state felony drug convictions for possessing cocaine are "aggravated felonies" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(B).

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In the Supreme Court of the United States

No. 03-115

OWIN FINBAR DANZELL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is unreported. The memorandum and opinion of the district court (Pet. App. 5-6) is unreported. The opinion of the Board of Immigration Appeals (Pet. App. 9-12) and the oral decision of the immigration judge (Pet. App. 16-24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. A petition for rehearing was denied on April 22, 2003 (Pet. App. 25-26). The petition for a writ of certiorari was filed on July 21, 2003. Petitioner does not identify the statutory provision believed to confer jurisdiction on this Court. See Sup. Ct. R.

14.1(e)(iv). It appears, however, that the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The term "aggravated felony" is defined for purposes of the immigration laws in the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43). Under Section 1101(a)(43)(B), the term includes a drug trafficking crime defined in 18 U.S.C. 924(c). Section 924(c)(2), in turn, provides that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. 924(c)(2). An alien who is convicted of an aggravated felony after admission to the United States is removable on that basis. See 8 U.S.C. 1227(a)(2)(A)(iii). Aggravated felons are ineligible to be considered for the discretionary immigration relief of cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(C).[1]

The INA also makes it unlawful for an alien to reenter the United States, without the consent of the Attorney General, after having been removed. 8 U.S.C. 1326(a). If the defendant's earlier removal followed a

---

[1] In 1996, amendments to the immigration laws instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229, 1229a; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 309(a) and (c), 110 Stat. 3009-625. Deportable aliens now are "removed" from the United States under a "removal order," whereas before the 1996 amendments they were "deported" under a "deportation order." For simplicity, this brief uses the term "removal" to encompass deportation.

conviction for commission of an aggravated felony, then a sentencing enhancement applies and the alien may be sentenced to a term of imprisonment of up to 20 years for the illegal-reentry offense. 8 U.S.C. 1326(b)(2). Implementing Section 1326(b)(2), the Sentencing Guidelines establish an eight-level enhancement of the defendant's offense level in an illegal-reentry prosecution if the defendant's earlier removal followed an aggravated-felony conviction. Sentencing Guidelines § 2L1.2(b)(1)(C). Commentary to the Guidelines states that "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction of the aggravated felony." *Id.* § 2L1.2, comment. (n.2).

2. a. Petitioner is a native and citizen of Trinidad. Pet. App. 16. In 1989, he became a lawful permanent resident of the United States. *Id.* at 2. In August 1999, petitioner was convicted in Texas, after pleading guilty, of felony possession of cocaine. He received a sentence of four years of imprisonment for that offense, but was not required to serve that sentence due to a deferred adjudication of guilt. *Id.* at 12, 17.

In January 2000, petitioner again was convicted in Texas, after a guilty plea, of felony cocaine possession. Petitioner was sentenced to a jail term of one year for his second offense. Pet. App. 17-18. He also was resentenced for his August 1999 conviction, for which he received a concurrent jail term of one year. *Id.* at 10.

b. In January 2001, the Immigration and Naturalization Service commenced removal proceedings against petitioner based on his drug convictions. At his removal hearing in February 2001, petitioner conceded that he is removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i) for having been convicted of a state controlled-substance offense. He contested, how-

ever, that he is removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii)—a ground of removal that would make him ineligible to receive the discretionary relief of cancellation of removal. Pet. App. 16-17.

The immigration judge (IJ) determined that petitioner is removable on both grounds charged by the INS and therefore ineligible for cancellation of removal. Pet. App. 23. Addressing the status of petitioner's drug convictions as aggravated felonies, the IJ first considered precedential decisions in which the Board of Immigration Appeals (BIA) had concluded that the term "aggravated felony," as used in 8 U.S.C. 1101(a)(43)(B), does not include first offenses for simple drug possession because such offenses, although punishable under the federal Controlled Substances Act, are not punishable *as felonies* under that Act. See 21 U.S.C. 844(a); Pet. App. 10 (discussing BIA cases). Applying that BIA precedent, the IJ determined that petitioner's August 1999 offense for cocaine possession should not be deemed an aggravated felony. *Id.* at 18-20. The IJ determined, however, that petitioner's January 2000 conviction *is* an aggravated felony under the BIA's cases because that second, recidivist offense could have been punished as a felony under the federal Controlled Substances Act, 21 U.S.C. 844(a). See Pet. App. 19-22.

c. The BIA affirmed and ordered petitioner removed to Trinidad. Pet. App. 9-15. It agreed with the IJ that petitioner's first drug conviction should not be treated as an aggravated felony under BIA precedent, and that the second conviction is a felony under that precedent because it is punishable as a felony under the Controlled Substances Act. *Id.* at 11.

The BIA also analyzed petitioner's case, which arose in the immigration court in Texas, under Fifth Circuit law. The BIA observed that the Fifth Circuit treats

first state felony convictions for simple possession of a controlled substance as aggravated-felony convictions. Pet. App. 11-12; see *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508, cert. denied, 534 U.S. 935 (2001). Contrary to the BIA's approach at the time of petitioner's removal proceedings, the Fifth Circuit has determined that the reference in 18 U.S.C. 924(c)(2) to "any felony punishable under the Controlled Substances Act" requires that the offense must be (1) a felony in the relevant jurisdiction and (2) potentially punishable under the Controlled Substances Act. See *United States* v. *Caicedo-Cuero*, 312 F.3d 697, 706-711 (5th Cir. 2002), cert. denied, 123 S. Ct. 1948 (2003); *Hernandez-Avalos*, 251 F.3d at 508; *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997). The BIA thus concluded in this case that *both* of petitioner's convictions are aggravated felonies under Fifth Circuit law "because possession of cocaine is clearly punishable under the Controlled Substances Act, and is a felony under Texas law." Pet. App. 12.

d. Petitioner sought review of the BIA's final order of removal in the Fifth Circuit. The government moved to dismiss the petition for review under 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony] covered in section * * * 1227(a)(2)(A)(iii)." 8 U.S.C. 1252(a)(2)(C). In October 2001, the court of appeals granted the government's motion to dismiss. Pet. App. 7.

3. Petitioner then challenged his removal order in a habeas corpus petition filed under 28 U.S.C. 2241 in the United States District Court for the Southern District of Texas. See Pet. App. 5. The district court dismissed the petition, holding that the court of appeals' dismissal

of petitioner's petition for review prevented the district court from exercising jurisdiction over the same claims in a habeas corpus proceeding. *Id.* at 6. The district court further stated, however, that petitioner would not obtain relief even if the court did have jurisdiction, because Fifth Circuit law clearly establishes that state felony convictions for possession of cocaine are aggravated felony convictions. *Ibid.* (citing *Hernandez-Avalos, supra,* and *Hinojosa-Lopez, supra*).[2]

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-2. The court of appeals stated that "[i]t is unclear from the record" whether petitioner's habeas corpus petition raised the same issues that were raised in his petition for direct review of the removal order, but affirmed the district court's decision on the basis that "the arguments [petitioner] raised in his 28 U.S.C. § 2241 petition concerning whether his state controlled-substance convictions are 'aggravated felonies' are foreclosed by [Fifth Circuit] precedents." *Id.* at 2 (citing *Hernandez-Avalos, supra,* and *Hinojosa-Lopez, supra*).

ARGUMENT

Although the question presented in the petition addresses a supposed requirement of national uni-

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[2] Petitioner named the Attorney General, among others, as a respondent to his habeas corpus petition in the district court. See Pet. App. 5. Although the Attorney General was the proper respondent in the petition for review proceeding in the court of appeals, see 8 U.S.C. 1252(b)(3)(A), he was not respondent's immediate custodian and was not present in the Southern District of Texas, and therefore was not a proper respondent to the habeas corpus petition. See *Schlanger* v. *Seamans*, 401 U.S. 487 (1971); *Roman* v. *Ashcroft*, 340 F.3d 314, 323-325 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); but see *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003).

formity in judicial interpretations of the immigration laws, see Pet. i, the question on which petitioner actually seeks review is whether the Board of Immigration Appeals correctly determined that he is removable under 8 U.S.C. 1227(a)(2)(A)(iii) as an aggravated felon, and therefore ineligible to apply for the discretionary relief of cancellation of removal. See Pet. 5 (petitioner "challenges his inclusion into a class of aliens known as 'aggravated felons'"). The court of appeals correctly upheld the BIA's decision, and there is no conflict with any decision of this Court or conflict among the circuits that warrants review by this Court. Moreover, whether or not the court of appeals was correct that petitioner's *first* state felony conviction for drug possession is an aggravated felony, petitioner is removable as an aggravated felon based on his *second* state felony conviction, which could have been prosecuted as a federal felony offense.

1. a. Numerous courts of appeals have considered the application of the "aggravated felony" definition in Sentencing Guidelines § 2L1.2—which incorporates the definition in the Immigration and Nationality Act—to state felony convictions for simple possession of a controlled substance. Those courts uniformly have concluded that a state offense satisfies the requirement of being a "felony punishable under the Controlled Substances Act," 18 U.S.C. 924(c)(2), if it is (1) a felony in the relevant jurisdiction and (2) potentially punishable under the Controlled Substances Act. Accordingly, the courts all have held that a drug possession offense that was punished as a felony under state law and would be punishable under the federal Controlled Substances Act constitutes an aggravated felony. See, *e.g.*, *United States* v. *Wilson*, 316 F.3d 506, 512 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003); *United States* v. *Ibarra-*

Galindo, 206 F.3d 1337, 1338-1341 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-148 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 999-1000 (10th Cir.), cert. denied, 519 U.S. 885 (1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-367 (1st Cir. 1996). In *United States* v. *Hernandez-Avalos*, 251 F.3d 505, cert. denied, 534 U.S. 935 (2001), the Fifth Circuit applied that same rule to the removal of an alien in the civil immigration context, directly under the INA's definition of "aggravated felony." *Id.* at 508.

Petitioner states (Pet. 7-8) that *Gerbier* v. *Holmes*, 280 F.3d 297 (3d Cir. 2002), and the Second Circuit's decision in *Pornes-Garcia*, *supra*, conflict with the Fifth Circuit's adherence, in the civil immigration context, to the rule uniformly applied under the Sentencing Guidelines. Like this case, *Gerbier* was a civil case involving habeas corpus review of an alien's order of removal. See 280 F.3d at 301-302. Also like this case, it arose against the background of earlier decisions in which the BIA concluded that the term "aggravated felony," as used in 8 U.S.C. 1101(a)(43)(B), does not include first offenses for simple drug possession because the federal Controlled Substances Act does not classify such offenses as felonies. See *Gerbier*, 280 F.3d at 304-306, 309-310. The Third Circuit accepted the BIA's application of the term "aggravated felony" in removal proceedings "[i]n light of * * * the need for uniformity in the immigration context," *id.* at 310-311, but specifically "reserve[d] for another day the proper interpretation of § 924(c)(2) in the Sentencing Guidelines context," *id.* at 299; see *id.* at 307. Similarly, the Second Circuit ac-

cepted the BIA's application of Section 1101(a)(43)(B) to simple possession offenses in the immigration context, see *Aguirre* v. *INS*, 79 F.3d 315, 317 (1996) (citing "the interests of nationwide uniformity" in immigration enforcement), while holding in the Sentencing Guidelines context that simple possession offenses are aggravated felonies, see *Pornes-Garcia*, 171 F.3d at 145-148.

The tension between the approach developed in criminal cases under the Sentencing Guidelines, and the approach the Second and Third Circuits have taken in civil cases involving the removal of aliens as aggravated felons, is likely to dissipate. In May 2002, the BIA reconsidered its application of the "aggravated felony" definition to drug possession convictions and concluded that the approach taken by the courts of appeals in criminal cases is the better-reasoned view. See *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 393-398 (BIA 2002) (en banc). The BIA stated that it would henceforth follow the law of the relevant circuit or, if the issue has not been decided in that circuit, apply the approach taken by the courts of appeals in criminal cases. *Id.* at 396-397. In light of the BIA's change of position, the Second and Third Circuits may well reconsider their approach to this issue in civil immigration cases.

b. There is no merit to petitioner's assertion (Pet. 5) that the limited and probably ephemeral conflict among the Second, Third, and Fifth Circuits in civil immigration cases "violates the United States Constitution's uniform rule of naturalization." Article I, Section 8, Clause 4 of the Constitution provides that "[t]he Congress shall have Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." Although that constitutional authorization supports the general federal authority to regulate the

status of aliens, see *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982), it specifically addresses the grant of naturalized United States citizenship, see *Rogers* v. *Bellei*, 401 U.S. 815, 823, 828-829 (1971), which is not at issue here. The uniformity requirement, moreover, pertains by its terms to congressional law-making, not judicial decision-making.

Petitioner offers no support for his novel suggestion that it violates the Constitution for lower Article III courts to disagree about the correct interpretation of provisions of the immigration laws. Petitioner also is mistaken when he argues (Pet. 9) that a law is uniform in the constitutional sense only if the results of its application are identical throughout the Nation, and do not depend on state laws or local conditions. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) ("Notwithstanding [the Article I, § 8, Cl. 4] requirement as to uniformity [of the bankruptcy laws] the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."); *Nehme* v. *INS*, 252 F.3d 415, 429 (5th Cir. 2001) ("[T]he Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state.").[3]

2. Finally, petitioner would not obtain relief from removal even if he prevailed in his argument that a first state felony conviction for possession of a controlled substance should not be treated as an aggravated felony under 8 U.S.C. 1101(a)(43)(B). The BIA also

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[3] The cases cited by petitioner (Pet. 9) involve federal preemption of state laws, not constitutional uniformity requirements for congressional action.

determined that petitioner is removable as an aggravated felon on the alternative ground that a conviction for recidivist possession of a controlled substance—here, petitioner's second conviction in January 2000—is an aggravated felony because it is punishable as a felony under the Controlled Substances Act. Pet. App. 11. That determination independently justifies petitioner's removal under 8 U.S.C. 1227(a)(2)(A)(iii) and his ineligibility for discretionary cancellation of removal.

This case therefore would not be an appropriate vehicle for consideration of the treatment of simple possession offenses under the immigration laws even if that issue otherwise warranted review by this Court, which it does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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